

Oct 02, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARJORIE B.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO. 4:17-CV-05104-SAB

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT;
DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

Before the Court is Plaintiff's Motion for Summary Judgment, ECF No. 12, and Defendant's Motion for Summary Judgment, ECF No. 20. The motions were heard without oral argument.

Plaintiff brings this action challenging the denial of disability benefits pursuant to 42 U.S.C. § 405(g). For the reasons set forth below, the Court **grants** Defendant's Motion for Summary Judgment, ECF No. 20, and **denies** Plaintiff's Motion for Summary Judgment, ECF No. 12.

ADMINISTRATIVE PROCEEDINGS

Plaintiff protectively filed an application for disability insurance benefits on January 29, 2013, alleging a disability onset date of December 31, 2012. AR 20.

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT** ^ 1

1 The application was denied initially on August 9, 2013, and upon reconsideration
2 on January 30, 2014. Thereafter, Plaintiff filed a written request for a hearing.

3 On August 26, 2015, a video hearing was held in Kennewick, Washington,
4 with Administrative Law Judge (“ALJ”) Cheri Filion presiding from Seattle,
5 Washington. At the hearing, the ALJ found Plaintiff was capable of performing
6 past relevant work as an office manager/administrative clerk. AR 32. Accordingly,
7 the ALJ found Plaintiff was not under a disability as defined in the Social Security
8 Act. The Appeals Council denied Plaintiff’s request for review. AR 1.

9 Plaintiff timely filed the present action challenging the denial of disability
10 benefits pursuant to 42 U.S.C. § 405(g).

11 SEQUENTIAL EVALUATION PROCESS

12 The Social Security Act defines disability as the “inability to engage in any
13 substantial gainful activity by reason of any medically determinable physical or
14 mental impairment which can be expected to result in death or which has lasted or
15 can be expected to last for a continuous period of not less than 12 months.” 42
16 U.S.C. § 423(d)(1)(A). A claimant shall be determined to be under a disability
17 only if the claimant’s impairments are of such severity that the claimant is not only
18 unable to do his previous work, but cannot, considering claimant’s age, education,
19 and work experience, engage in any other substantial gainful work that exists in
20 the national economy. 42 U.S.C. § 423(d)(2)(A).

21 The Commissioner of Social Security has established a five-step sequential
22 evaluation process for determining whether a claimant meets the definition of
23 disabled under the Social Security Act. 20 C.F.R. § 404.1520(a)(4); *Lounsbury v.*
24 *Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006).

25 At step one, the ALJ must determine whether the claimant is presently
26 engaged in “substantial gainful activity.” 20 C.F.R. § 404.1520(b). Substantial
27 gainful activity is defined as significant physical or mental activities done or

28 **ORDER GRANTING DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF’S MOTION FOR SUMMARY
JUDGMENT** ^ 2

1 usually done for profit. 20 C.F.R. § 404.1572. If the individual is engaged in
2 substantial gainful activity, he or she is not disabled. 20 C.F.R. § 404.1571. If not,
3 the ALJ proceeds to step two.

4 At step two, the ALJ must determine whether the claimant has a severe
5 medically determinable impairment, or combination of impairments, that
6 significantly limits the claimant's physical or mental ability to do basic work
7 activities. 20 C.F.R. § 404.1520(c). If the claimant does not have a severe
8 medically determinable impairment or combination of impairments, he or she is
9 not disabled. *Id.* If the ALJ finds the claimant does have a severe impairment or
10 combination of impairments, the ALJ proceeds to step three.

11 At step three, the ALJ must determine whether any of the claimant's severe
12 impairments "meets or equals" one of the listed impairments acknowledged by the
13 Commissioner to be sufficiently severe as to preclude substantial gainful activity.
14 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526; 20 C.F.R. § 404 Subpt. P. App. 1
15 ("the Listings"). If the impairment meets or equals one of the listed impairments,
16 the claimant is *per se* disabled and qualifies for benefits. If not, the ALJ proceeds
17 to the fourth step.

18 Before considering step four, the ALJ must determine the claimant's
19 "residual functional capacity." 20 C.F.R. § 404.1520(e). An individual's residual
20 functional capacity is his or her ability to do physical and mental work activities
21 on a sustained basis despite limitations from his impairments. 20 C.F.R.
22 § 404.1545(a)(1). In making this finding, the ALJ must consider all of the relevant
23 medical and other evidence. 20 C.F.R. § 404.1545(a)(3).

24 At step four, the ALJ must determine whether the claimant's residual
25 functioning capacity allows the claimant to perform past relevant work. 20 C.F.R.
26 § 404.1520(e)-(f). If the claimant can still perform past relevant work, he or she is
27

28 **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT** ^ 3

1 not disabled. If the ALJ finds the claimant cannot perform past relevant work, the
2 analysis proceeds to the fifth and final step.

3 At step five, the burden shifts to the Commissioner to prove the claimant is
4 able to perform other work in the national economy, taking into account claimant's
5 age, education, work experience, and residual functioning capacity. 20 C.F.R.
6 § 404.1520(g). To meet this burden, the Commissioner must establish (1) the
7 claimant is capable of performing other work; and (2) such work exists in
8 significant numbers in the national economy. 20 C.F.R. § 404.1560(c)(2); *Beltran*
9 *v. Astrue*, 700 F.3d 386, 388-89 (9th Cir. 2012).

10 STANDARD

11 A district court's review of a final decision of the Commissioner is
12 governed by 42 U.S.C. § 405(g). The scope of review under Section 405(g) is
13 limited, and the Commissioner's decision will be disturbed "only if the ALJ's
14 decision was not supported by substantial evidence in the record as a whole or if
15 the ALJ applied the wrong legal standard." *Shaibi v. Berryhill*, 883 F.3d 1102,
16 1106 (9th Cir. 2017). "Substantial evidence" is defined as "such relevant evidence
17 as a reasonable mind might accept as adequate to support a conclusion." *Molina v.*
18 *Astrue*, 674 F.3d 1104, 1121 (9th Cir. 2012). "The findings of the Commissioner
19 of Social Security as to any fact, if supported by substantial evidence, shall be
20 conclusive." 42 U.S.C § 405(g).

21 In reviewing a denial of benefits, a district court may not substitute its
22 judgment for that of the ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.
23 1992). If the evidence in the record "is susceptible to more than one rational
24 interpretation, [the court] must uphold the ALJ's findings if they are supported by
25 inferences reasonably drawn from the record." *Molina*, 674 F.3d at 1111.

26 Moreover, a district court "may not reverse an ALJ's decision on account of
27 an error that is harmless." *Id.* An error is harmless "where it is inconsequential to

28 **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT** ^ 4

1 the [ALJ's] ultimate nondisability determination.” *Robbins v. Soc. Sec. Admin.*,
2 466 F.3d 880, 885 (9th Cir. 2006). “[T]he burden of showing that an error is
3 harmful normally falls upon the party attacking the agency’s determination.”
4 *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

5 **STATEMENT OF FACTS**

6 The facts of this case are set forth in detail in the transcript of the
7 administrative proceedings and, therefore, are only briefly summarized here.
8 Plaintiff was born on March 22, 1962. She obtained a B.S. degree in computer
9 science and chemistry. AR 49. In December 2010, Plaintiff underwent a bilateral
10 mastectomy subsequent to being diagnosed with breast cancer, and in August
11 2011, Plaintiff underwent a complete hysterectomy. AR 412. Plaintiff currently
12 works part-time as a caregiver for DSHS. AR 59.

13 **ALJ’S FINDINGS**

14 **At step one**, the ALJ found Plaintiff had not engaged in substantial gainful
15 activity since December 21, 2013, the alleged onset date. AR 22.

16 **At step two**, the ALJ found Plaintiff suffers from the following severe
17 impairments: breast cancer in current remission, status post mastectomies and
18 chemotherapy, lymphedema, and affective disorder (major depression). AR 22.

19 **At step three**, the ALJ found Plaintiff does not have an impairment or
20 combination of impairments that meets or medically equals the severity of one of
21 the listed impairments in 20 C.F.R. § 404 Subpt. P. App. 1 (citing 20 C.F.R.
22 §§ 404.1520(d), 404.1525 and 404.1526). AR 22.

23 Before reaching step four, the ALJ found Plaintiff has the residual
24 functioning capacity to perform light work as defined in 20 C.F.R. § 404.1567(b),
25 with the following exceptions: Plaintiff can frequently climb ramps and stairs;
26 occasionally climb ladders, ropes, and scaffolds; crawl occasionally; occasionally

27
28 **ORDER GRANTING DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF’S MOTION FOR SUMMARY
JUDGMENT** ^ 5

1 reach bilaterally overhead; Plaintiff must avoid concentrated exposure to vibration
2 and hazards; and could perform work involving semi-skilled tasks. AR 23-24.

3 **At step four**, the ALJ found Plaintiff is capable of performing past relevant
4 work as an office manager/administrative clerk. AR 32. Accordingly, the ALJ
5 found Plaintiff was not disabled within the meaning of the Social Security Act.

6 **ISSUES FOR REVIEW**

- 7 1. Whether the ALJ erred in discounting medical opinion evidence?
- 8 2. Whether the ALJ erred at step two of the sequential evaluation process?
- 9 3. Whether the ALJ erred at step three of the sequential evaluation process?
- 10 4. Whether the ALJ erred in discounting Plaintiff's testimony?
- 11 5. Whether the ALJ erred in discounting lay witness testimony?
- 12 6. Whether the ALJ erred at steps four and five of the sequential evaluation
13 process?

13 **DISCUSSION**

14 **(1) The ALJ did not err in discounting medical opinion evidence.**

15 Plaintiff claims the ALJ improperly rejected the medical opinions of treating
16 physicians Dr. Charles Krause and Dr. Kenneth Cole. "Generally, a treating
17 physician's opinion carries more weight than an examining physician's, and an
18 examining physician's opinion carries more weight than a reviewing physician's."
19 *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001). In the absence of a
20 contrary opinion, a treating physician's opinion may not be rejected unless "clear
21 and convincing" reasons are provided. *Lester*, 81 F.3d at 830. If a treating
22 physician's opinion is contradicted, it may be discounted only for " 'specific and
23 legitimate reasons' supported by substantial evidence in the record." *Id.* at 830-31.
24 "The ALJ can meet this burden by setting out a detailed and thorough summary of
25 the facts and conflicting clinical evidence, stating [her] interpretation thereof, and
26 making findings." *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

27 //

28 **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT** ^ 6

1 **A. Dr. Krause**

2 Treating physician Dr. Krause provided two medical opinions. On February
3 17, 2014, Dr. Krause completed a Physical Medical Source Statement (the “2014
4 opinion”). AR 877. Dr. Krause opined that Plaintiff would need a job that permits
5 shifting positions at will from sitting to standing/walking, and that Plaintiff needs
6 to take a five to ten minute unscheduled break every one to two hours throughout
7 the day, due to pain, paresthesia/numbness and adverse effects of medication. AR
8 878. Dr. Krause further opined that Plaintiff has significant limitations in reaching,
9 handling, and fingering, and that Plaintiff’s symptoms are severe enough to
10 interfere with Plaintiff’s attention and concentration needed to perform simple
11 work tasks 25% or more of the day. AR 879-80. Dr. Krause concluded by finding
12 that if Plaintiff was trying to work full time, she would likely be absent more than
13 four days per month as a result of her impairments or treatment, and that Plaintiff
14 was incapable of tolerating even “low stress” work. AR. 880.

15 On August 7, 2015, Dr. Krause completed a Medical Report on behalf of
16 Plaintiff (the “2015 opinion”). AR 1141. Dr. Krause opined that Plaintiff must lie
17 down one to two times per day for thirty to sixty minutes; regular, continuous
18 employment would cause her condition to deteriorate due to aggravation of her
19 pain symptoms; she is limited to part-time sedentary work; and that she is limited
20 to occasional handling and reaching on both upper extremities. AR 1141-45.

21 The ALJ gave little weight to Dr. Krause’s opinions, finding (1) there were
22 clear contradictions in his opinions when comparing his two assessments; (2) Dr.
23 Krause attributed manipulative limitations to neuropathy, which is not a valid
24 impairment supported by objective evidence; (3) Plaintiff’s daily activities are
25 inconsistent with Dr. Krause’s 2015 opinion because she works as a caregiver
26 doing tasks greater than sedentary level employment; (4) Dr. Krause’s 2014
27

1 opinion is inconsistent with Plaintiff's allegations; and (5) Dr. Krause provided
2 little explanations for either opinion. AR 30.

3 The Court finds the ALJ provided "specific and legitimate" reasons for
4 discounting Dr. Krause's opinions. First, The ALJ discredited Dr. Krause's
5 testimony, in part, because of the inconsistencies between his two opinions. An
6 ALJ may reject inconsistent medical opinions from a treating physician.
7 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). In this case, the ALJ
8 identified two inconsistencies between Dr. Krause's 2014 and 2015 opinions.
9 First, the ALJ pointed out that in 2014, Dr. Krause opined that Plaintiff could lift
10 up to twenty pounds occasionally, with the combined ability to walk, stand, and sit
11 for eight hours in a work-day. AR 878-79. Then, in 2015, Dr. Krause opined that
12 Plaintiff was limited to part-time sedentary work. AR 1144. Dr. Krause's 2015
13 opinion also stated that Plaintiff would need to lie down thirty to sixty minutes,
14 one to two times a day. AR 1143. This limitation was not noted in Dr. Krause's
15 2014 opinion. These inconsistencies serve as a "specific and legitimate" reason for
16 discounting Dr. Krause's opinion.

17 Second, The ALJ also discredited Dr. Krause's opinion because Dr. Krause
18 attributed Plaintiff's manipulative limitations to neuropathy which, according to
19 the ALJ, is not supported by objective medical evidence. An ALJ may discredit a
20 treating physician's opinion if it is conclusory or unsubstantiated by relevant
21 medical evidence. *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995).

22 In this case, Dr. Krause opined that Plaintiff is significantly limited in her
23 ability to hold things, AR 879, and is limited to the occasional use of her upper
24 extremities. AR 1142. The ALJ discredited this opinion because there is no
25 evidence that Plaintiff ever underwent an EMG to substantiate the existence of a
26 nerve condition. AR 30. Plaintiff argues that the record establishes medical signs
27 of neuropathy, with symptoms of weakness, numbness, and pain.

28 **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT** ^ 8

1 While Plaintiff attempts to point at other evidence that supports her
2 position, if the evidence in the record “is susceptible to more than one rational
3 interpretation, [the court] must uphold the ALJ’s findings if they are supported by
4 inferences reasonably drawn from the record.” *Molina*, 674 F.3d at 1111. There is
5 nothing that would indicate the ALJ’s interpretation of the record on this point is
6 irrational. Thus, this also serves as a “specific and legitimate” reason for
7 discounting Dr. Krause’s opinion.

8 Third, the ALJ also discredited Dr. Krause’s opinion for being inconsistent
9 with Plaintiff’s self-reported limitations. Inconsistency between a treating
10 physician’s opinion and a claimant’s daily activities serves as a specific and
11 legitimate reason for discounting a treating physician’s opinion. *Morgan v.*
12 *Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 600-01 (9th Cir. 1999); *see also Fair*
13 *v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). In this case, Dr. Krause’s 2014
14 opinion indicates that Plaintiff has significant limitation walking, standing, and
15 sitting, AR 878, and that this limitation has existed since December 2010. AR 880.
16 On July 21, 2013, Plaintiff self-reported that she has no limitations walking,
17 standing, or sitting. AR 864. This inconsistency also serves as a “specific and
18 legitimate” reason to discredit Dr. Krause’s medical opinion.

19 As indicated above, the ALJ offered several valid reasons for discounting
20 Dr. Krause’s medical opinions. The Court need not address whether the ALJ’s
21 remaining reasons satisfy the “specific and legitimate” standard, as any error
22 would be harmless. *See Tommasetti*, 533 F.3d at 1038.

23 **B. Dr. Cole**

24 Treating physician Dr. Cole completed two mental functional capacity
25 assessments, one on February 26, 2016, AR 891-912, and one on August 5, 2015.
26 AR 1137-40.

27 //

28 **ORDER GRANTING DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF’S MOTION FOR SUMMARY
JUDGMENT** ^ 9

1 Dr. Cole opined that Plaintiff has marked¹ limitations in her ability to
2 understand and remember detailed instructions; maintain attention and
3 concentration for extended periods; make simple, work-related decisions;
4 complete a normal work-day and work-week without interruptions from
5 psychologically based symptoms, and to perform at a consistent pace without an
6 unreasonable number and length of rest periods; and interact appropriately with
7 the general public. AR 1137-38. Dr. Cole further opined that Plaintiff's mental
8 listings result in marked limitations in her activities of daily living; difficulties in
9 maintaining social functioning; and difficulties in maintaining concentration,
10 persistence or pace. AR 1139. Based on Plaintiff's cumulative limitations, Dr.
11 Cole determined that Plaintiff is likely to be off-task over 30% of the time during a
12 40-hour work-week, and that Plaintiff is likely to miss four or more days per
13 month. AR 1139.

14 The ALJ gave little weight to Dr. Cole's opinion, finding (1) Dr. Cole gave
15 inconsistent opinions in multiple areas, and did not explain these discrepancies;
16 (2) Plaintiff's daily activities contradicted Dr. Cole's opinion as to Plaintiff's
17 limitations; (3) Dr. Cole's opinion that Plaintiff has had four or more episodes of
18 decompensation is not supported by the record; (4) there was no testing performed
19 or other similar information to support the many severe mental limitations
20 identified by Dr. Cole; and (5) Dr. Cole's treatment notes failed to provide
21 adequate support for his findings. AR 30.

22 The Court finds the ALJ provided "specific and legitimate" reasons for
23 discounting Dr. Cole's opinion.

25 ¹ Marked limitations are defined as very significant interference with basic work-
26 related activities i.e., unable to perform the described mental activity for more than
27 33% of the work-day. AR 1137.

1 First, as indicated above, an ALJ may reject inconsistent medical opinions
2 from a treating physician. *Tommasetti*, 533 F.3d at 1041. In this case, Dr. Cole
3 initially opined that Plaintiff had moderate limitations in her activities of daily
4 living and concentration related functioning. AR 901. Dr. Cole later opined that
5 Plaintiff had marked limitations in these same areas. AR 1139. Additionally, Dr.
6 Cole's opinions also differed as to Plaintiff's ability to maintain attention and
7 concentration for extended periods; ability to perform activities within a schedule,
8 maintain regular attendance, and to be punctual within customary tolerances;
9 ability to sustain an ordinary routine without special supervision; ability to work in
10 coordination with or proximity to others without being distracted by them; ability
11 to make simple, work-related decisions; and ability to complete a normal work-day
12 and work-week without interruptions from psychologically based symptoms, and
13 to perform at a consistent pace without an unreasonable number and length of rest
14 periods. AR 905, 1137-38. These discrepancies are not explained in Dr. Cole's
15 reports.

16 The ALJ identified unexplained, inconsistent opinions in Dr. Cole's reports,
17 and determined these inconsistencies rendered Dr. Cole's opinions unreliable.
18 While Plaintiff disagrees with the ALJ's characterization of Dr. Cole's opinions,
19 the Court may not substitute its judgment for that of the ALJ. *Matney*, 981 F.2d at
20 1019. Thus, this reason is sufficient to affirm the ALJ's adverse credibility
21 determination of Dr. Cole.

22 Second, an ALJ may discredit a treating physician's opinion if it is
23 contradicted by the claimant's daily activities. *Morgan*, 169 F.3d at 600-02. In this
24 case, the ALJ noted that Dr. Cole found marked limitations in Plaintiff's ability to
25 concentrate for extended periods of time, AR 1137, yet Plaintiff had been working
26 up to four hours in a work-day, AR 59-60, read for enjoyment, AR 269, did
27 crossword puzzles, AR 269, and drives a truck, AR 268.

28 **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT** ^ 11

1 Dr. Cole also found Plaintiff had marked limitations with goals and
2 planning, AR 1138, yet Plaintiff had the freedom to choose her clients and work
3 hours, AR 59. Dr. Cole also found multiple social limitations, AR 1138, yet
4 Plaintiff never reported social problems and worked as a caregiver, which involves
5 substantial social interaction with clients. Plaintiff also reported that she
6 maintained contact with friend from a church, which she attends on a regular
7 basis. AR 850.

8 This reason also satisfies the “specific and legitimate” standard. An ALJ can
9 satisfy the “specific and legitimate” standard by “setting out a detailed and
10 thorough summary of the facts and conflicting clinical evidence, stating [her]
11 interpretation thereof, and making findings.” *Magallanes*, 881 F.2d at 750. The
12 ALJ did so here. The ALJ summarized Plaintiff’s daily activities; cited to specific
13 findings in Dr. Cole’s opinions; and determined that they were inconsistent with
14 one another. As such, this reason is also sufficient to affirm the ALJ’s adverse
15 credibility determination of Dr. Cole.

16 As indicated above, the ALJ offered several valid reasons for discounting
17 Dr. Cole’s medical opinions. The Court need not address whether the ALJ’s
18 remaining reasons satisfy the “specific and legitimate” standard, as any error
19 would be harmless. *See Tommasetti*, 533 F.3d at 1038.

20 **(2) The ALJ did not err at step two.**

21 The second issue for review is whether the ALJ improperly rejected
22 Plaintiff’s alleged severe limitations at step two of the sequential process. At step
23 two, the ALJ is required to determine whether an individual has one or more
24 severe medically determinable impairments. 20 C.F.R. § 404.1520(4)(ii). A
25 medically determinable impairment “must result from anatomical, physiological,
26 or psychological abnormalities that can be shown by medically acceptable clinical
27 and laboratory diagnostic techniques.” 20 C.F.R. § 404.1521.

28 **ORDER GRANTING DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF’S MOTION FOR SUMMARY
JUDGMENT** ^ 12

1 A “severe” impairment, or combination of impairments, is defined as one
2 that significantly limits a claimant’s physical or mental ability to do basic work
3 activities. 20 C.F.R. § 404.1520(c). “An impairment or combination of
4 impairments may be found ‘not severe only if the evidence establishes a slight
5 abnormality that has no more than a minimal effect on an individual’s ability to
6 work.’ ” *Webb v. Barnhart*, 433 F.3d 683, 686-87 (9th Cir. 2005) (quoting *Smolen*
7 *v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996)). The claimant has the burden of
8 proving his “impairments or their symptoms affect his ability to perform basic
9 work activities.” *Edlund v. Massanari*, 253 F.3d 1152, 1159-60 (9th Cir. 2001).

10 In this case, the ALJ found Plaintiff suffers from the following severe
11 impairments: breast cancer in current remission, status post mastectomies and
12 chemotherapy, lymphedema, and affective disorder (major depression). AR 22.
13 Plaintiff argues the ALJ committed error by failing to consider Plaintiff’s other
14 severe impairments, which include: anxiety; neuropathy of chest, back, and arms;
15 chronic respiratory issues; fractured rib; esophagitis; migraines/headaches;
16 arthritis of the knee with bone spurs; insomnia; irritable bowel syndrome;
17 endometrial hyperplasia; and pelvic pain.

18 Even if the ALJ failed to identify these alleged impairments as severe
19 medically determinable impairments at step two, such an error would be harmless.
20 Step two of the sequential analysis is “merely a threshold determination meant to
21 screen out weak claims.” *Bowen v. Yuckert*, 482 U.S. 137, 146-47 (1987). “It is not
22 meant to identify the impairments that should be taken into account when
23 determining the [Residual Functional Capacity].” *Buck v. Berryhill*, 869 F.3d
24 1040, 1048-49 (9th Cir. 2017). When assessing a claimant’s Residual Functional
25 Capacity, an ALJ will consider limitations and restrictions imposed by all of an
26 individual’s impairments, even those that are not “severe.” *Id.* Since step two was
27

28 **ORDER GRANTING DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF’S MOTION FOR SUMMARY
JUDGMENT** ^ 13

1 decided in Plaintiff's favor, and the ALJ continued through the sequential process,
2 any alleged error at this step is harmless.

3 **(3) The ALJ did not err at step three.**

4 Plaintiff argues that had the ALJ considered Dr. Cole's opinion, the ALJ
5 would have found Plaintiff disabled at step three. However, as indicated above, the
6 ALJ provided sufficient reasons for discounting Dr. Cole's opinion. As such, the
7 ALJ did not err at step three.

8 **(4) The ALJ did not err in discounting Plaintiff's testimony.**

9 An ALJ engages in a two-step analysis to determine whether a claimant's
10 testimony regarding subjective pain or symptoms is credible. *Garrison v. Colvin*,
11 759 F.3d 995, 1014 (9th Cir. 2014). "First, the ALJ must determine whether the
12 claimant has presented objective medical evidence of an underlying impairment
13 'which could reasonably be expected to produce the pain or other symptoms
14 alleged.' " *Id.* (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir.
15 2007)). In this analysis, the claimant is not required to show "that her impairment
16 could reasonably be expected to cause the severity of the symptom she has
17 alleged; she need only show that it could reasonably have caused some degree of
18 that symptom." *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir. 1996). Nor must a
19 claimant produce "objective medical evidence of the pain or fatigue itself, or the
20 severity thereof." *Id.*

21 If the claimant satisfies the first step of this analysis, and there is no
22 evidence of malingering, "the ALJ can reject the claimant's testimony about the
23 severity of [his] symptoms only by offering specific, clear and convincing reasons
24 to do so." *Id.* at 1281.

25 In this case, the ALJ found Plaintiff satisfied the first step of the analysis.
26 AR 25. Nonetheless, the ALJ discounted Plaintiff's subjective symptom claims for
27 the following reasons.

28 **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT** ^ 14

1 First, the ALJ found Plaintiff's self-reports have not always been consistent.
2 AR 25. "[T]he ALJ may consider inconsistencies either in the claimant's
3 testimony or between the testimony and the claimant's conduct," when evaluating
4 a Plaintiff's subjective complaints. *Molina*, 674 F.3d at 1112. In this case, the ALJ
5 found that in February 2013, Plaintiff indicated that she could lift less than 10
6 pounds, AR 270, then in December 2013, Plaintiff reported that she could lift less
7 than 20 pounds, AR 294. Additionally, Plaintiff testified that she would need to
8 change positions when sitting, AR 68, but denied any problems with sitting in her
9 functional report. AR 294. Plaintiff also reported issues with balance, yet was able
10 to walk at least a mile a day, and two to four miles on a good day. AR 270. The
11 ALJ discounted Plaintiff's subjective symptom claims based on these
12 inconsistencies.

13 The ALJ's first reason satisfies the "specific, clear and convincing"
14 standard. The ALJ identified several inconsistencies within Plaintiff's self-
15 reported symptom claims that warrant an adverse credibility determination.

16 Second, the ALJ found Plaintiff's daily activities contradict her symptom
17 claims. "Engaging in daily activities that are incompatible with the severity of
18 symptoms alleged can support an adverse credibility determination." *Ghanim v.*
19 *Colvin*, 763 F.3d 1154, 1165 (9th Cir. 2014). A Plaintiff's daily activities may also
20 support an ALJ's adverse credibility determination "if a claimant is able to spend a
21 substantial part of [her] day engaged in pursuits involving the performance of
22 physical functions that are transferable to a work setting." *Fair v. Bowen*, 885 F.2d
23 597, 603 (9th Cir. 1989).

24 However, the Ninth Circuit has "repeatedly warned that ALJs must be
25 especially cautious in concluding that daily activities are inconsistent with
26 testimony about pain, because impairments that would unquestionably preclude
27 work and all the pressures of a workplace environment will often be consistent

28 **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT** ^ 15

1 with doing more than merely resting in bed all day.” *Garrison v. Colvin*, 759 F.3d
2 995, 1016 (9th Cir. 2014).

3 [M]any home activities are not easily transferable to what may be the more
4 grueling environment of the workplace, where it might be impossible to
5 periodically rest or take medication. Recognizing that disability claimants
6 should not be penalized for attempting to lead normal lives in the face of
7 their limitations, we have held that [o]nly if [her] level of activity were
8 inconsistent with [a claimant’s] claimed limitations would these activities
9 have any bearing on [her] credibility.

10 *Id.* (internal citations and quotations omitted).

11 In this case, the ALJ found Plaintiff’s daily activities illustrate her capacity
12 to work at the light exertional level, if not more. For example, Plaintiff worked as
13 a caregiver for two clients, for up to twenty hours a week, and up to five days a
14 week. AR 26. A care provider is a medium level job under the Dictionary of
15 Occupational Titles (DOT). AR 26. And while Plaintiff’s work mostly involved
16 giving reminders, running errands, and other non-physically demanding tasks, the
17 ALJ found Plaintiff’s other work activities (housekeeping, bathing, dressing,
18 shopping, carrying groceries) were more physically demanding and were
19 consistent with the DOT’s description. AR 26. The ALJ found that “it is not
20 reasonable that [Plaintiff] would work as a caregiver or be paid to be a caregiver if
21 she had minimal ability to fulfill the physical aspects of the role. . . It is
22 unreasonable that she could fill this role throughout the period at issue but
23 concurrently alleged that she herself has debilitating physical and mental
24 limitations.” AR 26.

25 Plaintiff argues that the modest activities cited by the ALJ do not show
26 Plaintiff is capable of regular, continuous employment. And it is true; these
27 activities do not show Plaintiff is capable of regular, continuous employment. But
28 Plaintiff’s daily activities do provide the ALJ with a reason to discredit the
severity of Plaintiff’s subjective symptom claims.

**ORDER GRANTING DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF’S MOTION FOR SUMMARY
JUDGMENT** ^ 16

1 Here, Plaintiff's daily activities as a part-time caregiver show that Plaintiff
2 "is able to spend a substantial part of [her] day engaged in pursuits involving the
3 performance of physical functions that are transferable to a work setting." *Fair v.*
4 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). While these activities are modified to
5 accommodate Plaintiff's impairments, the ALJ uses these facts to discredit the
6 severity of Plaintiff's symptom claims. Thus, the ALJ's second reason also
7 satisfies the "specific, clear and convincing" standard.

8 Finally, the ALJ also discounted Plaintiff's symptom claims because the
9 objective medical evidence did not support Plaintiff's alleged physical symptoms.
10 AR 27. An ALJ must consider objective medical evidence when determining the
11 intensity and persistence of a claimant's alleged symptoms. 20 C.F.R. §
12 416.929(c)(2). An ALJ will not reject a claimant's statements about the intensity
13 and persistence of the pain "solely because the available medical evidence does
14 not substantiate [a claimant's] statements." *Id.*; *see also Burch*, 400 F.3d at 681
15 ("Although lack of medical evidence cannot form the sole basis for discounting
16 pain testimony, it is a factor the ALJ can consider in [her] credibility analysis").

17 In this case, Plaintiff claimed that she suffers from severe neuropathic pain,
18 yet a physical examination in July 2013 showed generally normal findings. AR
19 865-66. Plaintiff showed no difficulty sitting; she could get on and off the
20 examination table without assistance; gait and overall coordination was normal;
21 and she had mild left arm weakness. AR 865-66. In January 2014, an x-ray was
22 taken of Plaintiff's chest, in response to her allegations of debilitating chest pain.
23 AR 889. The results were negative with little changes since June 1, 2012. AR 889.
24 Additionally, the ALJ noted that there is no objective evidence of neuropathy,
25 such as an EMG study, to support allegations of severe neuropathic pain. AR 27.

26 This reason also satisfies the "specific, clear and convincing" standard for
27 discrediting a Plaintiff's testimony. The ALJ cited to specific medical evidence

28 **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT** ^ 17

1 and made a finding that such evidence contradicted Plaintiff's allegations of
2 chronic pain. As such, the ALJ did not err.

3 The Court need not address the ALJ's remaining reasons for discounting
4 Plaintiff's testimony. *See Molina*, 674 F.3d at 1115 (holding that an ALJ's error is
5 harmless where the ALJ provided one or more invalid reasons for disbelieving a
6 claimant's testimony, but also provided valid reasons that were supported by the
7 record.).

8 **(5) The ALJ did not err in rejecting lay witness testimony.**

9 Plaintiff argues that the ALJ improperly rejected the testimony of Plaintiff's
10 brother, Michael Schonhoff. Lay witness testimony, as to a claimant's symptoms
11 or how an impairment affects Plaintiff's ability to work, is competent evidence and
12 cannot be disregarded without comment. *Van Nguyen v. Chater*, 100 F.3d 1462,
13 1467 (9th Cir. 1996). An ALJ can reject the testimony of a lay witness only upon
14 giving a reason germane to that witness. *Smolen*, 80 F.3d at 1288.

15 In this case, Mr. Schonhoff submitted a third party function report. AR 281-
16 88. In his report, Mr. Schonhoff indicated that Plaintiff experiences constant pain
17 in her arms and chest; is restricted in her ability to lift/push/move objects of any
18 weight; and that she gets tired quickly and needs rest breaks often. AR 281. Mr.
19 Schonhoff also reported that Plaintiff's symptoms negatively impact her ability to
20 sleep, AR 282; engage in personal care, *Id.*; and complete house and yard work,
21 AR 284.

22 The ALJ found Mr. Schonhoff's testimony was very similar to Plaintiff's
23 symptom claims, and gave his statements some weight, but ultimately discounted
24 Mr. Schonhoff's testimony for the same reasons the ALJ rejected Plaintiff's
25 symptom claims. AR 31. As indicated above, the ALJ provided "specific, clear
26 and convincing" reasons for discrediting Plaintiff's symptoms claims. Thus, the
27 ALJ did not err in rejecting Mr. Schonhoff's testimony for the same reasons. *See*

28 **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT** ^ 18

1 *Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009) (“In
2 light of our conclusion that the ALJ provided clear and convincing reasons for
3 rejecting [Plaintiff’s] own subjective complaints, and because [lay witness’s]
4 testimony was similar to such complaints, it follows that the ALJ also gave
5 germane reasons for rejecting [the lay witness] testimony.”)

6 **(6) The ALJ did not err at step four or five.**

7 Finally, Plaintiff argues that the ALJ erred at steps four and five by relying
8 on the vocational expert’s response to an incomplete hypothetical. “The vocational
9 expert’s opinion about a claimant’s residual functional capacity has no evidentiary
10 value if the assumptions in the hypothetical are not supported by the record.”

11 *Magallanes*, 881 F.2d at 756.

12 In response to the ALJ’s hypothetical, the vocational expert found Plaintiff
13 was capable of performing past relevant work as an office manager/administrative
14 clerk. AR 72-73.

15 Plaintiff contends that the vocational expert’s opinion is without evidentiary
16 value because the hypothetical failed to account for the impairments set forth in
17 the opinions of Dr. Krause and Dr. Cole. In other words, Plaintiff restates her
18 argument that the ALJ improperly discounted medical opinion testimony.

19 The ALJ’s hypothetical contained all of the limitations that the ALJ found
20 credible and supported by substantial evidence in the record. Thus, the ALJ’s
21 reliance on the vocational expert’s testimony was proper. *See Magallanes*, 881
22 F.2d at 756-57 (holding that it is proper for an ALJ to limit a hypothetical to
23 restrictions supported by substantial evidence in the record).

24 //

25 //

26 //

27 //

28 **ORDER GRANTING DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT; DENYING PLAINTIFF’S MOTION FOR SUMMARY
JUDGMENT** ^ 19

1 **CONCLUSION**

2 For the foregoing reasons, the Court grants Defendant's Motion for
3 Summary Judgment, ECF No. 20, and denies Plaintiff's Motion for Summary
4 Judgment, ECF No. 12.

5 Accordingly, **IT IS HEREBY ORDERED:**

6 1. Defendant's Motion for Summary Judgment, ECF No. 20, is **GRANTED**.

7 2. Plaintiff's Motion for Summary Judgment, ECF No. 12, is **DENIED**.

8 3. The decision of the Commissioner of Social Security is **affirmed**.

9 4. The District Court Executive is directed to enter judgment in favor of
10 Defendant and against Plaintiff.

11 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
12 file this Order, provide copies to counsel, and **close the file**.

13 **DATED** this 2nd day of October 2018.



19
20
21

A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

22 Stanley A. Bastian
23 United States District Judge
24
25
26
27